Supreme Court, U.S.
FILED
SEP 11 2003
OFFICE OF THE CLERK

No. 03-162

# In the Supreme Court of the United States

BULL MOOSE TUBE COMPANY, CAPARO, INC., AND BULL MOOSE TUBE LIMITED,
*Petitioners*,

v.

CHARLES E. EMMENEGGER AND ROBERT F. RITZIE,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

FRANCIS E. PENNINGTON, III
LAW OFFICES OF FRANCIS E. PENNINGTON III, LLC
PIERRE LACLEDE CENTER
SUITE 1080
7733 FORSYTH BOULEVARD
ST. LOUIS, MO 63105
(314) 863-4080

FRANCIS X. NEUNER, JR.
*Counsel of Record*
SPENCER FANE BRITT & BROWNE LLP
1 NORTH BRENTWOOD BLVD.
SUITE 1000
ST. LOUIS, MO 63105
(314) 863-7733

*Counsel for Petitioners*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

## TABLE OF CONTENTS

Table of Contents . . . . . i

Table of Authorities . . . . . ii

Introduction . . . . . 1

Reply of Petitioners . . . . . 2

I. Respondents Incorrectly Frame The Question Presented. . . . . 2

II. Even Accepting Respondents' Premise That The Eighth Circuit Was Merely Applying An Abuse Of Discretion Standard, Respondents' Argument Is One Of Semantics, Not Substance. . . . . 5

III. Respondents Ignore The Flawed And Unprecedented Harmless Error Standard Adopted By The Eighth Circuit, Which Presents A Compelling Need For Clarification By This Court. . . . . 6

IV. Respondents' Argument Concerning The Correctness Of The Eighth Circuit's Decision Is Plainly Wrong. . . . . 9

Conclusion . . . . . 10

## TABLE OF AUTHORITIES

*Bersett v. K-Mart Corp.*,
869 F.2d 1131 (8th Cir. 1989) . . . . . 9

*Cox v. Dubuque Bank & Trust Co.*,
163 F.3d 492 (8th Cir. 1998) . . . . . 4

*Heller v. Int'l Corp. v. Sharp*,
974 F.2d 850 (7th Cir. 1992) . . . . . 10

*K.C. Power & Light Co. v. Ford Motor Credit Co.*,
995 F.2d 1422 (8th Cir. 1993) . . . . . 9

*Kotteakos v. U.S.*,
328 U.S. 750 (1946) . . . . . 7

*U.S. v. Lewis*,
53 F.3d 29 (4th Cir. 1995) . . . . . 5

*U.S. v. Smith*,
41 F.3d 1565 (D.C.Cir. 1994) . . . . . 5

*U.S. v. Whitehead*,
176 F.3d 1030 (8th Cir. 1999) . . . . . 9

*Walker v. AT&T Technologies*,
995 F.2d 846 (8th Cir. 1993) . . . . . 4

## INTRODUCTION

Respondents' Brief in Opposition is an exercise in misdirection. While Respondents Emmenegger and Ritzie attempt to re-frame the question presented in this case, they fail altogether to address the flawed and unprecedented harmless error standard adopted by the Eighth Circuit. Respondents' silence on that central issue is deafening.

Perhaps Respondents realize the Eighth Circuit's standard—holding that instructional error is harmless whenever there is disputed evidence from which a jury, had it been properly instructed, *may* have found against the aggrieved party—simply cannot withstand scrutiny. That standard conflicts with the harmless error standards applied by other Circuit Courts and runs contrary to principles previously espoused by this Court.

Rather than address this issue directly, Respondents take another tack. The chief basis on which Respondents oppose the Petition is their assertion that the Eighth Circuit did not apply the harmless error doctrine, and that Petitioners (collectively "the Company") miscast the holding below. However, as is evident from the Eighth Circuit's opinion, and as discussed below, it is Respondents—not the Company—who incorrectly characterize the holding of the Eighth Circuit. Moreover, even accepting Respondents' premise that the Eighth Circuit applied an abuse of discretion test, it is clear the Eighth Circuit held that the instructions defining "good faith" went to the central issue in the case, but the Company was not prejudiced by the rejection of those instructions. That rationale is indistinguishable from harmless error analysis. Accordingly, Respondents' argument is, at most, one of semantics, not substance.

Respondents' treatment of the issue only underscores the confusion created by the Eighth Circuit's decision, and the need for clarification by this Court.

## REPLY OF PETITIONERS

### I. Respondents Incorrectly Frame The Question Presented.

Respondents assert that the Eighth Circuit did not apply a harmless error analysis to the District Court's refusal of instructions that were central to the jury's decision in this case. Rather, according to Respondents, the Eighth Circuit simply applied an abuse of discretion test. This argument, however, mischaracterizes the Eighth Circuit's holding and the rationale underlying it.

Without question, the Eighth Circuit began its discussion of the District Court's refusal to give the proffered instructions defining "good faith" by referencing the abuse of discretion standard. *Appendix to Petition* ("*App.*") *11a.* The Eighth Circuit stated that it was required to find an abuse of discretion only if the proposed instructions "(1) correctly state the law, (2) concern a matter not otherwise covered by the charge to the jury, and (3) involve a point so important that the court's refusal to give the instructions 'seriously impaired the party's ability to present an effective case.'" *App. 11a* (citations omitted).

However, the Eighth Circuit expressly stated that it was not ruling on the basis of elements (1) or (2) in the three-part test quoted above. Moreover, the Eighth Circuit did *not* question that the refused instructions involved a matter that was vitally important to the case. To the contrary, the Eighth Circuit specifically found that the term "good faith," which

the refused instructions sought to define, was "relevant to the jury's deliberations because the terms of the PSP give the board authority to administer the Plan 'in the reasonable exercise of its discretion in good faith.'" *App. 11a.*

Nevertheless, the Eighth Circuit held that "the Company's case was not impaired" by the District Court's refusal to define this central term. *App. 12a.* According to the Eighth Circuit, "*there was no prejudice* to the Company from the District Court's rejection of the instructions." *App. 12a* (emphasis added).

The basis on which the Eighth Circuit found a lack of prejudice was clearly stated. First, the Eighth Circuit noted that the requested definition contained three elements, set out in the conjunctive: "the state of mind denoting honesty of purpose, freedom from intention to defraud, and faithfulness to one's duty or obligation." *App. 12a. See also App. 38a-39a.* Then the Eighth Circuit observed that "[e]ven though the proposed definition does not set out the three 'good faith' factors in the alternative, but apparently requires that a jury find of [sic] all of them if one is to prove good faith, the Company does not argue there was no evidence of the board's lack of faithfulness to 'its duty or obligation.'" *App. 12a.*[1] The Eighth Circuit thereby manifested its view that if there was *any* evidence supporting a finding for Respondents

---

[1] The Company respectfully disagrees with the Eighth Circuit's observation on this point. The Company adduced evidence that would have supported a finding that the Caparo board's decision met each of the elements of the requested definition. On appeal, the Company merely pointed out an utter lack of evidence introduced by Emmenegger and Ritzie on at least one of the elements. In any event, correct or not, the Eighth Circuit's observation demonstrates the flawed basis for its holding.

Emmenegger and Ritzie under the proposed definition, then the Company was not prejudiced by the refusal of the instruction.

Lest there be any doubt, the Eighth Circuit then amplified its rationale for finding no grounds for reversal, stating: "In any event, we think there was ample evidence that the board did not act with 'honesty of purpose' in firing Emmenegger and Ritzie with cause . . . ." *App. 12a.* In other words, according to the Eighth Circuit, the Company's case was not impaired because there was disputed evidence from which the jury, applying the terms of the refused instruction, still *may* have found against the Company.

The Eighth Circuit previously has equated such a conclusion—*i.e.*, that a party's case was not impaired—to a finding of harmless error. In *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492 (8th Cir. 1998), the Eighth Circuit stated:

> The third part of [the above-quoted] test, that failure to give the proposed instruction must have "seriously impaired the party's ability to present an effective case," incorporates this Court's requirement that failure to give a proposed instruction must result in prejudice to the requesting party before a new trial will be ordered.

*Id.* at 497. The Eighth Circuit, in *Cox,* cited to its earlier decision in *Walker v. AT&T Technologies*, 995 F.2d 846 (8th Cir. 1993), holding that if a district court errs in failing to give an instruction, then the appellate court "must determine whether the error was prejudicial." *Id.* at 849. In short, the

Eighth Circuit's finding that the Company was not prejudiced *was* a finding of harmless error.[2]

## II. Even Accepting Respondents' Premise That The Eighth Circuit Was Merely Applying An Abuse Of Discretion Standard, Respondents' Argument Is One of Semantics, Not Substance.

An appellate court's determination on whether a lower court's refusal to give instructions "seriously impaired the party's ability to present an effective case" *cannot* be considered merely an application of an abuse of discretion test. Such a determination is unlike review of a district court's decision about other portions of the three-part test quoted above, such as whether a proposed instruction presents matters otherwise covered by the charge to the jury—questions that are decidedly within the realm of a district court's discretion. Whether a district court's refusal of an instruction impaired a party's case is not a matter on which the district court exercises discretion or passes judgment at all. Rather, that question only arises on appeal, after the district court has made its determination, and therefore lies exclusively within the province of the reviewing court.

---

[2] Other Circuit Courts have also recognized that application of the latter part of the three-part test quoted above, requiring a determination as to whether a party's case was seriously impaired by a refused instruction, is indistinguishable from harmless error analysis. *See, e.g., U.S. v. Lewis*, 53 F.3d 29, 35 (4th Cir. 1995) (citing *U.S. v. Smith*, 41 F.3d 1565, 1568 (D.C. Cir. 1994)) ("[I]t would be anomalous to conclude that a district court's failure to give a defendant's proposed instruction which substantially impaired his ability to present his defense can be harmless.").

When the question becomes whether a posited erroneous failure to give an instruction prejudiced the aggrieved party, the inquiry is indistinguishable from the traditional harmless error analysis. At bottom, therefore, Respondents are engaging in semantics. Even if one were to adopt their characterization of the Eighth Circuit's holding, it still gives rise to the same question presented in the Petition: can a party be deemed not to have been prejudiced by a district court's refusal to give a jury instruction merely because there was disputed evidence from which the jury, had it been properly instructed, could have found against that party?[3]

## III. Respondents Ignore The Flawed And Unprecedented Harmless Error Standard Adopted By The Eighth Circuit, Which Presents A Compelling Need For Clarification By This Court.

According to the Eighth Circuit, instructional error is *not* prejudicial—*i.e.*, it is harmless—so long as there was evidence from which the jury, had it been properly instructed, *may* have found against the aggrieved party.

The cases cited in the Petition (at pages 12-13) demonstrate that the Eighth Circuit's decision has created a standard for harmless error review of instructional error which stands apart from that employed by other Circuits. It

---

[3] Respondents' confusion of the issue presented by the Eighth Circuit's decision highlights the compelling need for clarification. Even if Respondents' characterization of the issue were correct, the Eighth Circuit's opinion, at the very least, will likely be interpreted by courts in future cases as having promulgated a new harmless error standard. Because that standard is entirely unjustified and will spawn troublesome results, it is imperative that the Court provide guidance on this important matter.

matters not, as discussed above, whether the appellate courts in those other cases were applying an abuse of discretion standard of review to refused instructions (as Respondents contend). In each of those cases, the erroneous refusal of an instruction was held to be reversible error, notwithstanding that there was disputed evidence from which the jury could have found against the aggrieved party. Those decisions, therefore, run directly contrary to the Eighth Circuit's holding in this case.

Respondents ignore the true basis for the Eighth Circuit's holding. They make no attempt whatsoever to defend or justify the Eighth Circuit's rationale that instructional error can be deemed harmless simply because a jury *may* have relied upon disputed evidence and reached the same conclusion, had it been properly instructed. Respondents certainly do not deny that the Eighth Circuit's standard runs contrary to the principles espoused by this Court in *Kotteakos v. U.S.*, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.").

Respondents' silence on the central question presented, while telling, is understandable. The Eighth Circuit's unwarranted and unprecedented test for harmless error would essentially eliminate any recourse for instructional error. Any case that goes to a jury necessarily involves disputed factual issues. Under the Eighth Circuit's construct, a party aggrieved by instructional error could never obtain an appellate remedy in any case where it could be said that the jury *could* have applied proper instructions to disputed

evidence[4] and still reached the same verdict. Such a result would have far-reaching and untenable consequences, effectively stripping litigants of the sort of appellate review the judicial system is designed to afford them.

These circumstances cry out for review by this Court.

---

[4] This is *not* a case where there is a dispute about whether the refused instruction was supported by the evidence. Notwithstanding the impression created by Respondents' Statement of Facts, neither the Eighth Circuit nor Respondents questioned that the Company adduced evidence that would have supported a finding that the Caparo board acted in good faith. For instance, the Caparo board's conclusion, that the termination of Emmenegger's and Ritzie's employment was due to serious misconduct connected with a redistribution of phantom shares having an ultimate value of more than $1 million, was supported by evidence that: such a redistribution was not authorized by the terms of the phantom stock plan (*Ex. C-2*); one of the board members, whose authorization was necessary, insisted that a redistribution was never approved (*Tr. v.VI at 20-23*); outside counsel, who Emmenegger claimed would corroborate that a redistribution was approved, failed to do so (*Tr. v.VI at 23; Ex. E-13*); Emmenegger and Ritzie failed to consult with the corporate financial advisors, in contravention of a long-standing practice (*Tr. v.III at 100-110; Tr. v.IV at 4-8*); Emmenegger and Ritzie failed to document the purported redistribution, as other important plan transactions had been documented (*Exs. B-2, C-2, Y-2, C-3, E-3, G-3, N-11*); and Emmenegger and Ritzie themselves had made statements and taken actions which strongly suggested an attempt to hide the redistribution (*Exs. N-6, Z-6, J-7, O-7, Q-7; Tr. v.IV at 62*). Indeed, the jury itself found that Emmenegger's and Ritzie's redistribution of the shares was unauthorized. *App. 34a.*

## IV. Respondents' Argument Concerning The Correctness Of The Eighth Circuit's Decision Is Plainly Wrong.

In apparent recognition of the flaws in the Eighth Circuit's harmless error rationale, Respondents half-heartedly contend that the result reached by the District Court was correct anyway. They hypothesize that the Company was not impaired by the District Court's refusal to define "good faith" because, according to Respondents, the term is used in common parlance. As a threshold matter, Respondents' theory is misplaced because, as discussed above, that was *not* the basis for the Eighth Circuit's holding. To the extent that Respondents would suggest otherwise, the assertion is specious. Nowhere in its opinion did the Eighth Circuit make any finding that the refused instructions were unnecessary or superfluous.

Nor could the Eighth Circuit have made such a finding. Under the federal law applicable in this case, the District Court was required to define or explain any material term that may not have been readily understood by the jury or that presented a risk of confusion. *See U.S. v. Whitehead*, 176 F.3d 1030, 1040 (8th Cir. 1999).[5] In *K.C. Power & Light Co. v. Ford Motor Credit Co.*, 995 F.2d 1422 (8th Cir. 1993), the Eighth Circuit itself recognized that the term "good faith" fits that criteria, because it is "an amorphous concept, capable of many forms yet requiring none," and its meaning

---

[5] Respondents are incorrect in asserting that state law determined whether the requested instructions should have been given. Even though the District Court was applying state substantive law, the question whether to give or deny a jury instruction was governed by federal law. *See Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1135 (8th Cir. 1989).

"depends on the situation in which the term is used." *Id.* at 1430-31. Accordingly, there can be no question that the instructions defining the key concept of "good faith" should have been given, and indeed the Eighth Circuit did not hold otherwise.[6]

Rather, the Eighth Circuit held that the failure to give the instructions was not prejudicial—*i.e.*, harmless—based on a standard that is insupportable and intolerable, warranting intervention by this Court.

## CONCLUSION

For the foregoing reasons, and those previously submitted, the petition for writ of certiorari should be granted.

---

[6] Contrary to Respondents' suggestions, the fact that the parties themselves did not define the term "good faith" in the phantom stock plan only increased the need for guidance to be given to the jury. *See Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 858 (7th Cir. 1992).

Respectfully submitted,

FRANCIS X. NEUNER, JR.
*Counsel of Record*

Spencer Fane Britt & Browne LLP
1 North Brentwood Blvd.
Suite 1000
St. Louis, MO 63105
(314) 863-7733

FRANCIS E. PENNINGTON, III
Law Offices of Francis E. Pennington III, LLC
Pierre LaClede Center
Suite 1080
7733 Forsyth Boulevard
St. Louis, MO 63105
(314) 863-4080

*Counsel for Petitioners*